

**United States Department of Labor
Employees' Compensation Appeals Board**

R.B., Appellant

and

**DEPARTMENT OF HOUSING & URBAN
DEVELOPMENT, HEADQUARTERS,
Washington, DC, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 16-1732
Issued: March 16, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 30, 2016 appellant, through counsel, filed a timely appeal of a June 14, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish that his lower leg and feet conditions were causally related to factors of his federal employment.

FACTUAL HISTORY

On August 20, 2014 appellant, then a 54-year-old construction analyst, filed an occupational disease claim (Form CA-2) alleging that on July 7, 2014 he first became aware of his lower leg irritation, leg infection/cellulitis, and severe feet blistering and related these conditions to factors of his federal employment on July 18, 2014. He attributed his conditions to 8 to 10 hours of inspection per day, 3 to 5 times per week. Appellant stopped work on July 28, 2014 and has not returned.

Appellant, in support of his claim, appellant submitted prescription notes, discharge instructions, and the following medical evidence.

In a July 28, 2014 Miami Valley Hospital emergency room report and discharge notes, Dr. William R. Marriott, an examining Board-certified emergency room physician, diagnosed left leg ulcer due to skin breakdown. In the discharge instructions, appellant was informed that he had cellulitis, which was a skin infection.

A July 28, 2014 Ohio Bureau of Workers' Compensation Physician's Report was completed by Dr. W.H. Sneider, a family practitioner, who opined that appellant was disabled from performing his usual work. He diagnosed left leg and ankle sprains.

In a July 29, 2014 statement, appellant related that a treating physician had advised that his left leg, knee, and ankle problems were employment related. He provided a summary of treatment provided and the recommendation that he be seen by a vascular specialist.

The record contains an August 19, 2014 duty status report (Form CA-17) and September 23, 2014 nurse's notes signed by Therese Leftier, a certified nurse practitioner. The Form CA-17 contained a diagnosis of left ankle and knee sprain and provided work restrictions. The September 23, 2014 nurse's notes provided examination findings and diagnosed a left knee condition.

By letter dated October 8, 2014, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him regarding the medical and factual evidence required for acceptance of his claim. OWCP afforded him 30 days to submit the requested information. No further evidence was submitted within the allotted time.

By decision dated December 9, 2014, OWCP denied appellant's claim. It found the evidence of record insufficient to establish that the diagnosed medical conditions were caused or aggravated by the identified employment factors.

On December 26, 2014 appellant requested an oral hearing before an OWCP hearing representative.

By letter dated May 15, 2015, counsel requested the oral hearing be changed to a telephonic hearing, which was held on September 16, 2015.

By letter dated October 19, 2015, the employing establishing disputed appellant's statement that he was required to work up to 10 hours per day. It noted that his time and attendance record showed that he averaged 7.5 hours daily, did not work more than 80 hours biweekly, but rather averaged 59.1 hours biweekly. The employing establishment attached copies of appellant's time and attendance reports for the period December 13, 2013 through June 2014 as evidence of the hours he actually worked during this period.

By decision dated November 23, 2015, the hearing representative affirmed the denial of appellant's claim. She found the record devoid of any medical evidence establishing how the diagnosed medical conditions were caused or aggravated by the identified employment factors. Thus, the hearing representative determined that appellant had failed to meet his burden of proof to establish his occupational disease claim.

In a letter dated March 15, 2016, counsel requested reconsideration and submitted additional evidence.

On a prescription noted dated October 20, 2014, Dr. Edward Erb, a treating Board-certified vascular surgeon, opined that appellant was only capable of performing sedentary/desk work.

In an October 22, 2014 report, Dr. Kevin J. Paley, a treating Board-certified orthopedic surgeon, provided work restrictions due to multiple orthopedic conditions. The conditions included bilateral knee osteoarthritis, a 2010 left shoulder rotator cuff repair surgery, and right elbow distal biceps rupture.

In a December 4, 2014 report, Dr. Kevin F. Sunshein, a treating podiatrist, diagnosed chronic orthopedic and vascular leg and feet problems. He recommended that appellant be assigned to a sedentary position and provided work restrictions.

In a prescription note dated October 19, 2015,³ Dr. Erb diagnosed severe venous stasis wounds which he opined may have been aggravated by the prolonged standing required by his employment.

In a letter dated March 15, 2016, appellant disagreed with the employing establishment's October 19, 2015 letter claiming he provided an inaccurate work history. He contended that the time and attendance reports supplied by the employing established failed to accurately reflect the time he worked due to conflict with management. Appellant stated that working 10 to 12 hours per day during the week was not unusual and at times he worked a 14-hour day.

By decision dated June 24, 2016, OWCP denied modification. It found that appellant failed to submit medical evidence containing an accurate description of his employment

³ The date is unclear on the note. OWCP determined the date of the note to be October 19, 2015

activities, as well as examination findings, medical history, and medical rationale detailing how the diagnosed condition had been caused or aggravated by appellant's employment duties.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty, as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁶

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁷

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁸ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.⁹ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹⁰

ANALYSIS

Appellant filed an occupational disease claim alleging that his lower leg irritation, infection/cellulitis and severe feet blistering had been aggravated by his duties as a construction

⁴ *Supra* note 2.

⁵ C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁶ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *D.U.*, Docket No. 10-144 (issued July 27, 2010); *R.H.*, 59 ECAB 382 (2008); *Roy L. Humphrey*, 57 ECAB 238 (2005); *Donald W. Wenzel*, 56 ECAB 390 (2005).

⁸ *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

⁹ *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

¹⁰ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

analyst. OWCP denied his claim finding that the medical evidence failed to establish a diagnosed medical condition which had been caused or aggravated by his implicated employment factors.

The Board finds that the medical evidence of record is insufficient to establish that the claimed condition of cellulitis, leg and feet conditions were causally related to his duties as a construction analyst. Thus, the Board finds that appellant has failed to meet his burden of proof.

The record is devoid of any medical evidence discussing how appellant's employment as a construction analyst caused or aggravated the diagnosed medical conditions. In support of his claim, appellant submitted reports from Drs. Marriot, Paley, Sneider, Sunshein and Erb. None the medical reports from these physicians is sufficient to establish causal relationship for the reasons set forth below.

On July 28, 2014 Dr. Marriott diagnosed a left leg ulcer, and cellulitis which he attributed to a skin breakdown. No opinion was proffered as to the cause of the diagnosed condition. Similarly, Dr. Sneider, in a July 28, 2014 work capability report, offered no opinion as to the cause of the conditions he diagnosed, left leg and ankle sprains. Drs. Sunshein and Paley also offered no opinion as to causal relationship in their reports. Dr. Sunshein diagnosed chronic orthopedic and vascular leg and feet problems while Dr. Paley diagnosed bilateral knee osteoarthritis, right elbow distal biceps rupture, and 2010 left shoulder rotator cuff repair surgery. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹¹ Thus, the reports from Drs. Marriott, Paley, Sneider, and Sunshein are insufficient to support appellant's burden of proof.

Dr. Erb is the only physician who addressed causal relationship. In an October 19, 2015 note, he diagnosed chronic vascular and orthopedic leg and feet problems, which he opined might have been aggravated by appellant's prolonged standing. The Board has long held that medical opinions which are speculative and equivocal are of diminished probative value.¹² Dr. Erb also did not provide an adequately detailed medical history or describe appellant's employment duties as a construction analyst. Medical reports without any medical rationale explaining causal relationship are of diminished probative value and do not meet an employee's burden of proof.¹³ The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.¹⁴ For these reasons, Dr. Erb's opinion is insufficient to establish appellant's claim.

¹¹ See *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹² *Frank Luis Rembisz*, 52 ECAB 147 (2000).

¹³ *C.B.*, *supra* note 11; *S.E.*, *supra* note 11; *Richard A. Neidert*, 57 ECAB 474 (2006)

¹⁴ *Id.*

Appellant also submitted a Form CA-17 and nurse's notes by Ms. Leftier, a certified nurse practitioner. Medical opinion, in general, can only be given by a qualified physician.¹⁵ Nurse practitioners are not physicians under FECA.¹⁶ As such, Ms. Leftier's opinion is of no probative value.

The record before the Board lacks any rationalized medical evidence with a diagnosed medical condition causally related to the accepted employment incident. OWCP advised appellant that he must provide a comprehensive medical report which described his symptoms, test results, diagnosis, treatment, and include a physician's opinion on the cause of his condition. Appellant failed to submit medical documentation in response to OWCP's request. The Board has held that the fact that a condition manifests itself during a period of employment does not raise an inference of causal relationship.¹⁷ An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated, or aggravated by his work as a construction analyst is sufficient to establish causal relationship.¹⁸ To establish a firm medical diagnosis and causal relationship, appellant must submit a physician's report that addresses how his employment duties of a construction analyst caused or aggravated his lower leg irritation, leg infection, and severe feet blistering.¹⁹ As there is no probative, rationalized medical evidence explaining how the diagnosed conditions were causally related to his employment, he has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that lower leg irritation, infection/cellulitis, and severe feet blistering were causally related to factors of his federal employment as a construction analyst.

¹⁵ *E.K.*, Docket No. 09-1827 (issued April 20, 2010); *Allen C. Hundley*, 53 ECAB 551 (2002).

¹⁶ Section 8101(2) of FECA provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See *B.B.*, Docket No. 09-1858 (issued April 16, 2010); *Roy L. Humphrey*, 57 ECAB 238 (2005).

¹⁷ *L.D.*, Docket No. 09-1503 (issued April 15, 2010); *D.I.*, 59 ECAB 158 (2007); *Daniel O. Vasquez*, 57 ECAB 559 (2006).

¹⁸ See *D.U.*, Docket No. 10-144 (issued July 27, 2010); *D.I.*, *id.*; *Robert Broome*, 55 ECAB 339 (2004); *Anna C. Leanza*, 48 ECAB 115 (1996).

¹⁹ *Michael S. Mina*, *supra* note 9; *Michael E. Smith*, 50 ECAB 313 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 14, 2016 is affirmed.

Issued: March 16, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board